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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

FEDERAL MARITIME COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NON-FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred in affirming the Federal Maritime Commission's determination that matters of labor-management policy, which are within the jurisdiction and expertise of the National Labor Relations Board, need not be considered in assessing the legality of a carrier's practice under the federal shipping laws.

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BRIEF FOR THE NON-FEDERAL RESPONDENTS IN OPPOSITION

This case concerns the legality of the Rules on Containers (Rules), a set of practices embodied in shipping line tariffs that severely restrict the use of containers [1]

[1] "Containers. . . . are large metal receptacles that can be loaded (. . . 'stuffed') at off-pier facilities, . . . transported to a pier, and finally, loaded directly into specially designed 'container ships.' The containers can likewise be removed from the ship and transported directly to the ultimate consignee for unloading (or 'stripping')" (Pet. App. 6a). A consolidator combines the goods of various shippers into a single container and delivers the container to the pier (Pet. App. 7a).

by exporters, importers, consolidators, truckers and warehousemen—the very groups that the federal shipping laws protect against unreasonable and discriminatory practices by shipping lines.[2] The court of appeals, without dissent, upheld a unanimous Federal Maritime Commission (FMC or Commission) determination, rendered after an evidentiary hearing, that the challenged practices violate the federal shipping laws.

Because the Rules have their genesis in collective bargaining agreements that have been found lawful by the National Labor Relations Board,[3] petitioners insist that the FMC was obliged to balance labor considerations against the proscriptions of the shipping laws in deciding whether the Rules are lawful under the shipping laws. But when this Court considered the status of the Rules under the federal labor laws in *NLRB* v. *International Longshoremen's Association (ILA I)*, 447 U.S. 490 (1980), and *NLRB* v. *International Longshoremen's Association (ILA II)*, 473 U.S. 61 (1985), it admonished the NLRB not to look at factors outside the labor laws, such as the impact of the Rules on off-pier parties, in determining whether the Rules constituted valid terms of the ILA's collective bargaining agreements. Regulation of the employers "as common carriers," and assessment of the lawfulness of their tariffs under the shipping laws, were specifically left to the FMC—the agency assigned that responsibility by Congress (*ILA I*, 447 U.S. at 512; see also *ILA II*, 473 U.S. at 78). Accordingly, the FMC's

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[2] Shipping Act of 1984, 46 U.S.C. App. § 1701 *et seq.*; Shipping Act of 1916, 46 U.S.C. § 801 *et seq.*; Intercoastal Shipping Act of 1933, 46 U.S.C. § 843 *et seq.*

[3] The steamship lines' tariffs incorporate rules on containers, which are part of their collective bargaining agreements, along with additional provisions passing on labor costs and liquidated damages to shippers. *Council of North Atlantic Shipping Associations* v. *FMC (CONASA)*, 672 F.2d 171, 178 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982).

determination that it could not modify the requirements of the shipping laws to accommodate the ILA-shipping line labor agreements, but could only consider labor issues in fashioning a remedy under the shipping laws, is plainly consistent with this Court's prior decisions and raises no issues that merit further attention.

PARTIES, OPINIONS BELOW, JURISDICTION AND APPLICABLE STATUTES

The references to the parties to the proceeding, to opinions below, to statements of jurisdiction and to applicable statutes as set forth in the petition for a writ of certiorari filed by petitioners International Longshoremen's Association *et al.*, on November 3, 1988, are hereby incorporated by reference herein.[4]

STATEMENT

1. *Impact Of The Rules On U.S. Commerce.* Rules restricting the use of containers in ocean shipping were first included in collective bargaining agreements between longshoremen and carriers operating from east coast ports nearly 20 years ago because longshoremen believed that their jobs were threatened by containerized cargo handling methods (Pet. App. 77a-79a). Both management and labor have acknowledged that the Rules have failed in their objective to "bring work back" to the piers, because the Rules did not address the underlying economic reasons for the decline in the longshoremen's hours: *i.e.*, outdated work rules, high wages and fringe benefits, increasing competition from lower cost ports and relocation of plants.[5] Indeed, shortly after the FMC's

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[4] Petitioners are the International Longshoremen's Association, AFL-CIO (ILA), and collective bargaining representatives for east coast shipping lines, including the Council of North Atlantic Shipping Associations (CONASA) and the New York Shipping Association, Inc. (NYSA).

[5] *Journal of Commerce*, Aug. 12, 1988 at 1A, col. 6 (John Bowers, President, International Longshoremen's Union, explained that ILA

decision was affirmed by the court of appeals, the ILA assured shippers that there would be "no disruptions in service," *i.e.*, no strikes, even though the container rules could no longer be enforced. Both sides publicly declared a willingness to explore alternatives that would make ILA labor more competitive.[6]

History confirms that the invalidation of the Rules will not result in chaos on the piers. The Rules have been in effect only sporadically during the past 20 years.[7] And, despite perennial threats of labor strife whenever the Rules' operation has been enjoined, as in the period from March 1981-1983, there have not been any such strikes.

Although the Rules have not retained enough work to satisfy longshoremen, they have imposed heavy burdens on exporters, importers, consolidators, distributors and others. The Rules deny the shipping public the "full advantage of the benefits of container shipping," *CONASA*, 672 F.2d at 177, thereby imposing a considerable disadvantage in comparison to counterparts in competing trading nations that do not operate under these impediments. The benefits of containers include lower rates and reduction of dockside delays, damage and pilferage. The use of containers also facilitates intermodalism—the

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members worked more man hours when the Rules were enjoined in the 1970's than under the Rules); *Traffic World*, Vol. 206 No. 6 pp. 82-83, May 12, 1986 (quoting Detweiler, President of CONASA); Congressional Information Bureau, Inc. (CIB), Vol. 92, No. 220, pp. 18-19, Nov. 16, 1988 (quoting Anthony J. Tozzoli, President, NYSA). It is widely recognized that the container rules foster uneconomic operations. See *ILA II*, 473 U.S. at 82-83, 90 (Rehnquist, J. dissenting) *ILA I*, 447 U.S. at 511, 526-27 (Burger, C.J., dissenting).

[6] *Journal of Commerce*, Aug. 12, 1988 at 1A, col. 6.

[7] *Journal of Commerce*, Nov. 1, 1988 at 2B, col. 2. It was only when the union decided to seek review in this Court that the carriers announced that they would enforce the Rules. *Journal of Commerce*, Oct. 24, 1988 at 10B, col. 3.

through movement of cargo over several transportation modes. Pet. App. 6a-7a; *ILA I*, 447 U.S. at 494-95; *CONASA*, 572 F.2d at 174.

Simply stated, the Rules require that a shipping container be loaded or unloaded by ILA labor at the pier if the container's origin or destination is within 50 miles of an east or gulf coast port. Ocean carriers must refuse to supply containers without charge to persons who engage in off-pier consolidations within 50 miles of these ports. "Qualified" shippers (*i.e.*, persons whose containers are loaded by their own employees at their own facilities) are the only shippers exempt from these restrictions.[8] If non-exempted cargo arrives at the pier already loaded in containers, the container must be unloaded (stripped) and reloaded (stuffed) by ILA longshoremen; monetary penalties also are assessed against the non-"qualified" shipper or consolidator. We next discuss the discriminatory impact of the Rules upon different types of affected businesses.

a. *Exporters*—Several simple illustrations demonstrate the hardship and discrimination that the Rules impose upon small exporters. At a public warehouse near the Port of Boston, a small exporter's cargo is efficiently loaded into a container, filling more than 90 percent of its capacity. Because Boston does not have carrier service to the container's particular destination, the container is transported to the Port of New York, some 220 miles away. At the New York pier, the container is stripped by ILA labor and the packages are then restuffed in the same container at a cost that varies from $200 to $325 per container (Pet. App. 9a). Because the ILA pier workers do not load as efficiently as the exporter's employees, the exporter may need a second container, thus

[8] Shipping lines provide empty containers without charge to shippers for off-pier loading to reduce dockside congestion, labor costs and paperwork. *CONASA*, 672 F.2d at 174. These same benefits are realized when containers are supplied to consolidators.

incurring double freight charges as well as problems in tracing the shipments and coordinating delivery. *CONASA*, 672 F.2d at 177. The exporter suffers this delay, expense and increased risk of loss[9] because the initial consolidation took place within 50 miles of an ILA port, Boston (Pet. App. 182a-183a).

A second exporter loads his container at a public warehouse 220 miles due west of New York. When this container reaches the pier, it is loaded aboard the vessel without incident because the consolidation was not accomplished within a 50-mile radius of an ILA port.

A third exporter, located within 50 miles of the port, but large enough to maintain a warehouse, loads his container in his own facility using his own employees. His merchandise is also loaded aboard the vessel without hindrance (Pet. App. 119a, 182a-183a).

b. *Importers*—The Rules impose similar burdens on small importers. If an importer is large enough to have his own warehouse within the port area, his container is released from the pier and the merchandise may be distributed from his warehouse immediately. Otherwise, the importer has two options. He may have the container stripped at the pier, which exposes the goods to loss, damage and delay. Alternatively, the importer may have the container taken to a public warehouse. In that event, the merchandise, which is frequently of great value, cannot be removed from the public warehouse for 30 days. The importer cannot even pass title to the goods during that period (Pet. App. 182a-183a, 189a).[10] Of course,

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[9] During the FMC hearings, petitioner Sea-Land, the largest U.S. flag carrier, admitted that rehandling of the cargo under the Rules increased the risk of pilferage, and that when on-pier stuffing and stripping are eliminated, pilferage, damage and loss are almost nil.

[10] These restrictions are imposed under the carriers' tariffs even though their contracts of carriage with the importers ended at shipside with the off-loading of the container.

increased costs to the importer are reflected in higher prices to U.S. consumers.

c. *NVOCCs*—In the 1984 Shipping Act, Congress recognized the non-vessel operating common carrier by water (NVOCC) as a legal entity that is classified as a shipper in its relationship with a steamship line. 46 U.S.C. App. § 1702(17). NVOCCs stuff the shipments of smaller exporters into a container, at off-pier locations, ship the container by vessel and charge rates within the margin between the steamship line's rates applicable to break-bulk shipments (which the smaller shippers would otherwise have to pay) and lower "freight-all-kinds" rates governing consolidated container loads (Pet. App. 6a-7a, 173a-174a). Notwithstanding petitioners' derogatory comments about NVOCCs (Pet. 4), the "benefits of NVO's to smaller shippers, carriers and the commerce of the United States has long been recognized by Congress, the courts and the Commission" (Pet. App. 174a). Among such benefits are NVOCCs' lower rates, shorter delivery times, the need for only a single bill of lading, reduced packing expenses, substantially less loss, damage and pilferage and the provision of specialized services not provided by the steamship lines, all of which have particular value to the small shipper. *CONASA*, 672 F.2d at 174.

The Rules nevertheless prohibit shipping lines from furnishing containers to NVOCCs and other consolidators. To stay in business, an NVOCC or other off-pier consolidator must lease or purchase containers (at a cost of $200-300 for a one-way voyage). Pet. App. 8a-9a. As a result, many who "previously operat[ed] within the 50-mile zone have been severely affected and in some cases have been forced to cease operations." *CONASA*, 672 F.2d at 177. "By contrast, carriers furnish containers at no charge to 'qualified' shippers or consignees, as well as to shippers and manufacturers outside the

50-mile zones" (Pet. App. 9a). Accordingly, NVOCCs who compete with the shipping lines for cargo within the 50-mile zone are subjected to substantial extra costs and shipping delays. Pet. App. 8a-9a; *CONASA*, 675 F.2d at 188.

d. *Trucking Firms and Public Warehousemen*—Trucking firms move containers to and from the piers. As a result of the Rules, they cannot load and reload containers off-pier to meet weight, safety or delivery requirements. *ILA I*, 447 U.S. at 501. Many truckers that provide consolidation services have lost revenue because their customers have either hired firms located beyond the 50-mile limits or chosen to do the work themselves. Likewise, public warehousemen located near port cities cannot provide the full range of their customary delivery services.

e. *U.S. Ports, Carriers and Other Persons*—Containerized traffic is diverted to Canadian and non-ILA U.S. ports, causing ILA ports, U.S. flag carriers, forwarders and customs brokers to lose business.

2. *History Of Litigation.*—a. *Proposed Rules and CONASA.* In 1973, concern over the Rules' adverse impact on commerce between the United States and Puerto Rico prompted a FMC investigation of the implementing tariffs and carrier practices. *Sea-Land Service Inc.—Proposed Rules on Containers (Proposed Rules)*, 21 F.M.C. 1, 14 (1978). CONASA, an intervenor, claimed that the validity of the Rules was confided exclusively to the NLRB and, therefore, exempt from regulation under the shipping laws. After an evidentiary hearing, the Commission determined that it could properly exercise jurisdiction over tariff provisions that unreasonably burden and discriminate against exporters, importers and consolidators, regardless of the provisions' labor origins, and it found these tariffs unlawful.

On a petition for review limited to the jurisdictional question, the court of appeals unanimously confirmed the FMC's authority to determine whether tariff provisions incorporating the Rules on Containers violate the obligations imposed upon common carriers by the shipping laws. *CONASA*, 672 F.2d at 173. Making no judgment on the substantive merits of the Rules, the court remanded for additional consideration in light of "intervening judicial decisions." *CONASA*, 672 F.2d at 173, 179 n.67, 189.[11] Thus, *CONASA* did not approve or disapprove the FMC's finding of illegality. Neither, as the same court subsequently made clear, did it "determine what standards the Commission was required to apply in its investigation" (Pet. App. 35a-36a). *CONASA* did, however, point to the basic difference in the function and effect of the Rules in the carrier/union and carrier/shipper contexts, explaining that the NLRB and FMC were each "required to ask" different questions. *CONASA*, 672 F.2d at 181. This Court denied certiorari. 459 U.S. 830 (1982).

b. *The Current Proceeding Before the Commission*— In early 1981, the Rules were briefly reimplemented for two months. Complaints by injured parties prompted the FMC to open a broad-scale investigation of the allegedly discriminatory and unreasonable carrier practices under these tariffs. After an initial procedural phase, an Administrative Law Judge (ALJ) received first-hand evidence from NVOCCs, forwarders, warehousemen, truckers and custom brokers that the carriers' practices imposed costly burdens on their operations and impeded the efficient exportation and importation of merchandise.

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[11] The court of appeals vacated only the FMC's order discontinuing Docket 73-40, not the decision itself. *Proposed Rules* was held open awaiting a final decision in Docket 81-11. The court took this action so that the FMC might consider whether labor policy considerations should be factored into a substantive Shipping Act analysis of the Rules *before* that issue was considered by a reviewing court (Pet. App. 36a).

Proponents of the Rules presented their evidence of "labor policy considerations," the agency having asked the parties to address that issue before deciding whether it had any significance under the shipping laws. Pet. App. 144a-146a.

In his Initial Decision, the ALJ acknowledged that the "sole basis" of the tariff provisions incorporating the Rules is the "preservation of work of members of the ILA," that the Rules were "not promoted by conditions attendant to the transportation of the cargoes affected by them" and that they are "arbitrary in the sense that the nature of the commodity has no bearing on the application of the rule" (Pet. App. 250a). The ALJ found that, under established transportation considerations, the Rules would be held unlawful (Pet. App. 251a).

Faced with "real difficulty" in "line drawing" between the competing arguments about the relevance of the carriers' labor agreement (Pet. App. 241a), the ALJ "proposed a new methodology" (Pet. App. 150a), balancing the harm to the shipping public against the benefits purportedly derived by the ILA (Pet. App. 241a-242a). Although the ALJ made no findings of the extent of actual benefits realized from the Rules, he concluded that no violations of law had been established.

The Commission rejected this "radically new" approach on the ground that it negated the basic common carrier obligation to provide transportation in a reasonable and non-discriminatory manner (Pet. App. 166a). Applying "traditional transportation factors," the FMC concluded that the tariff rules were facially defective because they imposed economic burdens that bore no relation to the nature of the commodity being moved or the service provided.[12] The FMC observed that the evidence

[12] A carrier performs the same service—transporting a loaded container aboard its vessel—whether or not the container is loaded by ILA labor at pierside. The use of longshore labor does not make labor a "transportation factor." Labor, like fuel or terminal rent,

of actual injury "supports and confirms the evidence provided by the text of the Rules themselves" (Pet. App. 175a-176a). Consequently, the FMC held that the disparate treatment of shippers tendering off-pier loaded containers, which caused shippers to suffer additional delay, expenses and fines, constituted unreasonable and discriminatory shipping practices (Pet. App. 179a-189a). Moreover, it held that the denial of containers to cargo consolidators unreasonably discriminated against them inasmuch as they were denied a transportation facility made freely accessible to other shippers (Pet. App. 176a-179a).

After carefully reviewing its legislative mandate and the relevant judicial decisions, the FMC concluded that the shipping law objective of promoting nondiscriminatory fair practices for ocean commerce need not and should not be altered to accommodate labor interests in protecting jobs. Prior judicial decisions, the FMC held, "show that a common carrier may not bargain away [statutory] duties in a labor agreement and then defend its actions on the grounds that it served a greater public interest by avoiding a strike and preserving 'labor peace'" (Pet. App. 163a). The Commission noted that "common carriers in other transportation modes have not been excused from their statutory obligations on the basis of collective bargaining agreements with their employees" (Pet. App. 163a-164a). To permit the collectively bargained Rules to excuse the carrier's obligations would, it explained, "license . . . unlawful practices" because such practices could always be shielded by claims of "labor peace" (Pet. App. 164a). The Commission rejected a methodology that would permit carriers to bargain with the union without any incentive to safeguard

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is simply one of many costs to the carrier reflected in the freight rate. Cases cited by supporting respondent, West Gulf Maritime Association (WGMA), provide examples of this treatment of labor costs. Br. 16 n.17.

their fundamental common carrier obligations (Pet. App. 163a-164a). Furthermore, such a methodology would "require the Commission to make findings of fact outside its area of expertise" (Pet. App. 168a).

The agency did, however, accommodate "labor interests" in fashioning a remedy that would "avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate ILA's interests in some manner other than the present Rules on Containers" (Pet. App. 192a, 172a).[13] Following the court of appeals' affirmance, the carriers appeared to be prepared to undertake this mission, until the ILA's decision to petition for certiorari derailed their efforts.

3. *The Decision Below.* A unanimous panel of the court of appeals affirmed. Applying the standard of review mandated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Counsel*, 467 U.S. 837, 842-45 (1984), the court below gave appropriate deference to the FMC's "interpretation of the statute it is entrusted to administer." First, the court agreed with the FMC's determination that, absent consideration of labor factors, the Rules could not be upheld under the statute because they could not be justified in transportation terms (Pet. App. 30a-31a). Furthermore, the court held:

- the FMC's decision not to take labor factors into account except in fashioning a remedy followed the guidelines established by this Court in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *Local 1976, International Brotherhood of Carpenters and Joiners* v. *NLRB* ("*Sand Door*"), 357 U.S. 93 (1958); *Southern Steamship*

[13] To further minimize any possible encroachment on collective bargaining, the FMC eliminated the question of penalties for violation of the statutory provisions at issue, restricting its remedy to a cease and desist order against further tariff publication and enforcement of the unlawful provisions. Accord, *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 165, 172-74 (1962).

Co. v. *NLRB*, 316 U.S. 31 (1942); and *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) (Pet. App. 40a-58a);

- the FMC reasonably interpreted those guidelines as requiring it to decide whether Congress had intended it to take account of labor policies within the framework of the Shipping Act (Pet. App. 56a-57a);
- the FMC's refusal to excuse "obvious" shipping law violations because of a carrier's "obligations under a collective bargaining agreement" or the "threat of labor unrest" was neither unreasonable nor inconsistent with its shipper-protective statutory mandate (Pet. App. 31a, 60a-62a); and
- *ILA I* and *ILA II* "made it clear" that independent consideration of the labor law and shipping law issues is "possible" (Pet. App. 62a).

Insofar as the ILA's "right to bargain to retain work" is concerned, the court of appeals explained that labor and management remained free to "negotiate mutually acceptable work preservation terms that conform to [the FMC's] decision" (Pet. App. 57a). The court observed, however, that "[i]t is not the national labor policy to allow otherwise unlawful activity merely because an employer and a union have agreed to it in mandatory collective bargaining" (Pet. App. 58a).

REASONS FOR DENYING THE WRIT

The court of appeals unanimously upheld the unanimous determination of the expert administrative agency —the FMC—that the Shipping Act does not require the FMC to consider labor factors in determining whether a common carrier has violated its obligation to provide nondiscriminatory service. That decision follows from this Court's rulings in *ILA I* and *ILA II* and other cases and does not conflict with any decision of this Court or any other court of appeals. Moreover, the court of appeals'

decision is correct. Petitioners' contrary rule would defeat the goals of the Shipping Act by freeing carriers to engage in discriminatory practices with abandon as long as a carrier first incorporates those practices into its labor contracts. For all of these reasons, review by this Court is not warranted.

1. The FMC's determination that its statutory mandate does not authorize consideration of labor policies raises no new or substantial legal issues. That result was clearly forecast in *ILA I* and *ILA II* when this Court forcefully criticized the NLRB for considering shipping law policies in determining whether the Rules were a valid work preservation agreement under the labor laws, and reserved the "difficult and complex" transportation issues for consideration by the FMC. *ILA I*, 447 U.S. at 512, 507, n.22; *ILA II*, 473 U.S. at 79.[14]

Moreover, the factors favoring review by this Court in those cases are not present here. *ILA I* and *ILA II* each involved disagreements between the expert agency and the reviewing court; in addition, *ILA I* involved conflicts among the courts of appeals and a divided panel of the District of Columbia Circuit. See 447 U.S. at 493. None of those circumstances exists in this case. The question presented is of limited significance, involving ocean carriers subject to special obligations imposed by the shipping laws and a labor agreement to implement obsolete and ineffective container rules. This Court having twice delimited the responsibilities of federal agencies exercising specially focused oversight over activities involving the Rules in question, and the FMC and court of appeals having acted in harmony with its views, no further review is required.

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[14] Contrary to petitioners' intimations (Pet. i, 9), this Court previously stated only that the shipping law issues were important. It did not state that those issues necessarily required plenary consideration by the Court.

2. The decisions below are plainly correct and consistent with this Court's precedents. *McLean Trucking* makes clear that the "immediate frame of reference" of a transportation agency assessing the obligations of a common carrier is its own legislation and the policies expressed in that legislation. 321 U.S. at 80. Whether the agency must make any "adjustments" of its regulatory behavior to accommodate the policies of another regulatory regime depends on "the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the [agency] is primarily and directly concerned." [15] Thus, the Court in *McLean Trucking* required the ICC to consider antitrust effects in approving mergers because those concerns were incorporated into its organic legislation as part of the national transportation policy. 321 U.S. at 85-86.

In this case, by contrast, this Court has twice ruled that the shipping and labor policies involved in assessing petitioners' container rules are separate and distinct, and that transportation policies are "irrelevant" to the labor law analysis. *ILA I*, 473 U.S. at 507 n.22; *ILA II*, 473 U.S. at 78. This Court called it "fundamental error[]" when the NLRB tried to harmonize these diverse statutory schemes by considering the Rules' effect on outside persons, instead of focusing solely on the collective bargaining objectives of the labor laws. *ILA II*, 473 U.S. at 79.

When the FMC applied these same principles, it found that the policies of the shipping and labor laws differ so "fundamentally" that the proposed incorporation of labor interests in its Shipping Act determination would mean the "effective removal of any protection for shippers" and "abandon[ment of its] fundamental Shipping Act

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[15] This directive was repeated in *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 493-94 (1967).

obligations" (Pet. App. 168a-169a, 171a-172a).[16] It further found that there was no "reasonable or feasible methodology" by which it could accommodate labor interests in its substantive analysis (Pet. App. 171a). Any such attempt would trespass on another agency's jurisdiction and would cause the FMC to act in an area where it lacked expertise.[17] Accordingly, it properly concluded that labor policies should be considered only in fashioning a remedy so as to minimize interference with the collective bargaining process.

3. The resulting FMC decision not to excuse the carrier's Shipping Act violations simply because the underlying collective bargaining agreement had been held lawful under the labor statutes follows a familiar path. *Sand Door* recognized that a common carrier may "fail in [its] obligations" to provide nondiscriminatory service under a transportation statute when carrying out its obligations under a lawful collective bargaining agreement. 357 U.S. at 110-111; see also *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957) (a common carrier is not relieved of its service obligation by a "hot cargo" clause), cited with approval in *Sand Door*, 357 U.S. at 109. And, in *Burlington Truck*, this Court expressly acknowledged that the ICC

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[16] The divergence of labor and shipping law policies is well-established. The primary objective of labor policy is to ensure unfettered collective bargaining, without regard to the harm to other persons. *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 312-16 (1968) (Douglas, J., dissenting). The policies to which the FMC must give effect are the promotion of "an efficient and economic transportation system" and the protection of shippers. 46 U.S.C. App. § 1701; *CONASA*, 672 F.2d at 191.

[17] *Burlington Truck* warns against attempts to accommodate another statute that would require an agency to "trench upon [another's jurisdiction, and, because of lack of expert competence," contravene its policies. 371 U.S. at 173. See also *Volkswagenwerk*, 390 U.S. at 286 (Harlan, J., concurring) ("the Commission will not improperly be brought into labor matters where it does not belong").

could enforce a common carrier service obligation against carriers constrained by labor agreements.[18] At no time in the course of the lengthy proceedings before the FMC have petitioners cited a single case in which a common carrier was permitted to interpose its collective bargaining obligations between the public and its statutory duties (Pet. App. 60a, 163a).

4. The court of appeals broke no new ground when it held that the FMC acted reasonably in declining to consider labor factors in making its substantive shipping law determinations. Before approving the FMC's decision, the court ascertained that the agency had first "engage[d] in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed" and then "explain[ed] why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime," as required by *Burlington Truck* (Pet. App. 53a, 56a).

Thus, the court of appeals determined that the FMC's analysis was proper and that its choice was not "inconsistent with the statutory mandate" and did not "frustrate the policy that Congress sought to implement." Once the court had completed the review mandated by *Chevron*, it quite properly affirmed the FMC's determination (Pet. App. 61a).

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[18] In reversing the ICC's choice of remedy, a plurality of the Court did not indicate that the ICC should require carriers to perform their service obligations only to the extent that those obligations did not conflict with their obligations under collective bargaining agreements. The language in Justice Goldberg's concurring opinion, cited in supporting respondents' brief (Br. 16-17), refers to the subsequent passage of legislation invalidating the hot cargo clauses that had caused the service disruptions. At that point, Justice Goldberg explained, the ICC could have issued a cease and desist order "under which no conflict could or would have arisen." 371 U.S. at 177.

5. The court of appeals did not ignore, or limit, the FMC's obligation to consider the effects its actions might have on the policies of other statutes and to tailor its remedy to minimize them. Rather, based on this Court's decisions, it explained that a reviewing court should substitute its own accommodation (in fashioning a remedy) for the agency's determination only if there is a "true conflict" between rights and obligations established in the agency's own statute and in another statute, or if the agency has frustrated a congressional directive to consider other policies (Pet. App. 47a-56a). Neither of those circumstances is present here. Petitioners thus seriously misstate the obligations of an agency when they speak (Pet. 14) of a "duty to harmonize" in all situations.[19] In sum, the court of appeals did not fashion a novel test;

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[19] The cases cited by petitioners and WGMA do not establish a duty by an agency to compromise the substantive requirements of its own statutes in favor of conflicting policies in another statute. In *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946), both statutes were "directed towards protection of the public against deceptive practices," and could be harmonized without conflict. *Southern Steamship*, 316 U.S. 31, focused on the abuse of discretion in giving a remedy. As this Court explained in *Sand Door*, there was no "suggestion [in *Southern Steamship*] that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes." 357 U.S. at 111. *United States* v. *Borden Co.*, 308 U.S. 188 (1939), *Morton* v. *Mancari*, 417 U.S. 535 (1974), *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and *Radzanauer* v. *Touche Ross & Co.*, 426 U.S. 148 (1976), are cases in which this Court rejected claims that statutes were repealed by implication. Moreover, neither WGMA nor petitioners explain how the conflicting labor policies could be "harmonized" with Shipping Act policies. The FMC considered the possible alternatives and concluded that it could not safeguard the shipping interests it is required to protect under any proposed accommodation (Pet. App. 164a-172a). The accommodation petitioners advocate would result in the effectve repeal of the Shipping Act protections.

it simply used a different formulation to describe settled Supreme Court doctrine.[20]

6. Petitioners argue (Pet. 14, 1-2; Br. 15-16) that by forbidding "unjust" and "unreasonable" discrimination and practices, Congress signaled a desire for statutory accommodation—or, at the least, established a "discretionary" standard of such elasticity that it was an abuse of discretion for the agency not to consider labor factors.

In fact, as the cases cited by petitioners show (Pet. 14), the need for an agency to consider the policies of another statute arises from *specific* provisions of its own or the other legislation. See *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485 (1967) (Section 11 of the Clayton Act and the national transportation policy); *McLean Trucking Co.*, 321 U.S. at 86 ("objectives of the national transportation policy"); *Community Television of Southern California* v. *Gottfried*, 459 U.S. 498, 509 n.14 (1983) ("general words 'public interests' in the Communications Act are not sufficient").[21]

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[20] Even if the court of appeals could be said to have developed a new approach, further review should await a case in which the outcome under this Court's precedents is not as clearly correct as the decision here.

[21] Conversely, "capacious" language does not import authority to enforce or exempt other statutes. *NAACP* v. *FPC*, 425 U.S. 662 (1976); *Silver*, 373 U.S. 341; see also *California* v. *FPC*, 369 U.S. 482 (1962). It should be noted that the pertinent provisions of the Shipping Act relating to carrier practices do not contain the terms "public interest," "lawful object" or "just and adequate," which are used to illustrate petitioners' argument (Pet. 14). Moreover, the Shipping Act was amended in 1984 to remove the "public interest" standard under which the Commission considered the policy of other statutory schemes such as the antitrust laws in approving agreements among carriers. H.R. Rep. No. 600, 96th Cong., 2nd Sess. (1984). For these and other reasons, the court of appeals found inapposite (Pet. App. 57a) the cases cited by WGMA (Br. 14-15). *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978), and *New York Shipping Ass'n* v. *FMC*, 495 F.2d 1215 (2d Cir.),

The proscriptions of the Shipping Act are not discretionary in the sense that the agency may excuse a violation for reasons beyond the Act's objectives. Their legislative purpose was to "protect the shipping industry's customers, not members of the industry." *Boston Shipping Ass'n* v. *FMC*, 706 F.2d 1231, 1238 (1st Cir. 1983); *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 USSB 41, 45 (1922) ("duty . . . to serve the public impartially"). The Shipping Act prohibition against unjust and unreasonable carrier practices, and its purpose, closely parallel requirements of the Interstate Commerce Act that a carrier must satisfy notwithstanding its obligations under a collective bargaining agreement or threats of labor unrest. See *Burlington Truck*, 371 U.S. at 161, and *Galveston*, 73 MCC at 625-26. The court of appeals properly found that an interpretation of the Shipping Act that followed established transportation law was entirely reasonable (Pet. App. 60a-62a).

7. Petitioners' real criticism of the deferential standard of review mandated by *Chevron* and followed by the court of appeals is that the court did not require the FMC to subordinate shipping policies to labor law policies. In other words, petitioners contend that the FMC should defer Shipping Act enforcement to the result reached under the labor laws—*i.e.*, it should grant a de facto exemption from the Shipping Act, contrary to *CONASA*'s holding that there is no basis in law for such an exemption.[22]

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cert. denied, 419 U.S. 964 (1974) ("dictum" related to a procedure that was "dropped from the law by the 1984 Act because of the problems it created for collective bargaining").

[22] WGMA says so explicitly (Br. 18). As far as petitioners are concerned, harmonization is strictly a one-way street. In *ILA I* and *ILA II*, they objected to the NLRB's considering harm to offpier interests and did not propose that shipping factors be taken into account in making labor determinations.

This view—that the union's interest in negotiating a particular work preservation formula should take precedence over the FMC's mandate to advance commerce and protect shippers—finds no support in either statute or case law.[23] It runs directly counter to the holdings of this Court that there is no established right or congressional policy embodied in the labor statutes that insulates any particular collectively bargained benefit from the requirements of other statutes. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664-66 (1965). Contrary to respondents WGMA's claim (Br. 13), the labor laws did not require, or "substantially shape[]," or even "encourage[]" the carriers to agree to the particular work preservation scheme embodied in the Rules. Because a union and an employer "must bargain does not mean that the agreement reached may disregard other laws." *United Mine Workers*, 381 U.S. at 665; *Volkswagenwerk*, 380 U.S. at 286-87 (Harlan, J., concurring). There is simply no reason why the carriers could not comply with the labor laws *and* the shipping laws *and* any other applicable statutes in their collective bargaining activities.

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[23] Petitioners criticize the court of appeals for failing to recognize work preservation as a "labor law right" that the FMC was obligated to consider as a justification for the carriers' discriminations (Pet. 10-11). The court put this claim in proper context when it explained that employees "have a right to bargain to retain work" but that this right is not a "substantive right" to retain that work and that the "carriers were not, under the express or implied terms of the labor laws, obligated to accede to the union's work preservation demands" (Pet. App. 57a-58a). No question about the status of work preservation under the national labor laws is raised by its decision. Nor is there any conflict with that same circuit's decision in *Sheet Metal Workers Int'l Ass'n Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974), or *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907, 910 (6th Cir. 1970), which concern the unions' right to bargain for work preservation protections.

8. During the 20 years in which the validity of the Rules has been the subject of litigation, the carriers and the ILA have insisted that the Rules are lawful and that labor unrest and the disruption of vital shipping services would be the consequence of their invalidation. Now these shopworn fears are urged in support of the needless further involvement of this Court. In fact, implementation of the Rules has been halted in the past and no strike occurred. Moreover, it is clear from the initial reactions to the court of appeals' decision by both the carriers and the union that both sides recognize that the Rules have not achieved their work preservation purposes and that it is possible to put in place alternative labor protection mechanisms. The Rules now represent nothing more than a bargaining chip in the current negotiations between the carriers and the union. But they also are an artificial and significant restraint on our foreign commerce and an unnecessary obstacle to lower cost ocean liner services. By focusing petitioners' efforts on negotiating a prompt, workable agreement that respects the rights of the shipping public as well as the dock workers, denial of this petition will greatly serve the public interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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